3-2500-17117-2
MPUC Docket No. P-5733,421/IC-06-49

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Qwest Corporation

ORDER ON MOTION TO COMPEL DISCOVERY AND MOTION TO STRIKE TESTIMONY

This matter came before Administrative Law Judges Kathleen D. Sheehy and Steve M. Mihalchick on Level 3's Motion to Compel Discovery and Motion to Strike Testimony. A telephone hearing on the Motion to Compel was held March 28, 2007. The motion record closed at the conclusion of the telephone conference.

Scott Porter, Esq., Level 3 Communications, Inc. (Level 3), One Technology Center, Tulsa, OK 74103; and Erik Cecil, Esq., 1025 Eldorado Boulevard, Broomfield, CO 80021, appeared for Level 3.

Thomas Dethlefs, Esq., Qwest Services Corporation, 1801 California Avenue, Suite 1000, Denver, CO 80202; and Ted D. Smith, Stoel Rives LLC, 201 South Main Street, Suite 1100, Salt Lake City, UT 84111, appeared for Qwest.

Based on all of the files and proceedings herein, and for the reasons contained in the Memorandum attached hereto, the Administrative Law Judges make the following:

ORDER

1. Level 3's Motion to Compel Discovery is GRANTED in part and DENIED in part. For those requests to which Qwest must respond more fully, Qwest shall do so by April 10, 2007; and

2. Level 3's Motion to Strike Testimony is DENIED.

Dated: March 28, 2007

s/Kathleen D. Sheehy

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KATHLEEN D. SHEEHY
Administrative Law Judge

s/Steve M. Mihalchick

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STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

The Minnesota Public Utilities Commission referred this matter to the Office of Administrative Hearings for Arbitration on February 8, 2006.[1] After several revisions to the procedural schedule based on the agreement of the parties and the holding of a day-long technical conference on February 6, 2007, the hearing is scheduled to take place April 11-13, 2007.

This proceeding requires the resolution of language disputes concerning the following difficult and inter-related issues of interconnection:

(1) How the parties are to share the cost of facilities used to exchange traffic;

(2) Whether the parties may exchange all types of traffic over interconnection trunks;

(3) Whether Qwest is obligated to compensate Level 3 for terminating VNXX-type ISP-bound traffic; and

(4) Whether the parties are obligated to pay termination compensation to each other for the exchange of IP-enabled or VOIP traffic.

Level 3's Motion to Compel Discovery

On November 11, 2006, Level 3 served its First Set of Information Requests and First Set of Requests for Admission on Qwest. Qwest responded on December 8, 2006. Qwest's response included objections to some of the discovery requests and requests for admission. On March 9, 2007, Level 3 filed

[1] *In the Matter of Qwest Corporation's Application for Commission Review of TELRIC Rates Pursuant to 47 U.S.C. § 251*, Notice and Order for Hearing (Sept. 15, 2006).

a motion to compel discovery. Qwest responded to the motion on March 22, 2007.

The rules of the Office of Administrative Hearings specify that any means of discovery available under the Rules of Civil Procedure for the District Court of Minnesota is allowed and authorize the filing of motions to compel. The rules further state that a party bringing a motion to compel must show the discovery is needed for the proper presentation of its case, is not for delay, and the issues or amounts in controversy are significant enough to warrant the discovery. The party resisting discovery may raise any objections that are available under the Minnesota Rules of Civil Procedure, including lack of relevancy and privilege.[2]

Rule 26.02 of the Minnesota Rules of Civil Procedure permits discovery regarding any unprivileged matter that is "relevant to the subject matter involved in the pending action," including information relating to the "claim or defense of the party seeking discovery or to the claim or defense of any other party." Materials that may be used in impeachment of witnesses may also be discovered as relevant information.[3] It is well accepted that the discovery rules are given "broad and liberal treatment" in order to ensure that litigants have complete access to the facts prior to trial and thereby avoid surprises at the ultimate hearing or trial.[4] Administrative Law Judges at the OAH "have traditionally been liberal in granting discovery when the request is not used to oppress the opposing party in cases involving limited issues or amounts."[5]

The definition of relevancy in the discovery context has been broadly construed to include any matter "that bears on" an issue in the case or any matter "that reasonably could lead to other matter that could bear on any issue that is or may be in the case."[6] As a general matter, evidence is deemed to be relevant if it would logically tend to prove or disprove a material fact in issue.[7] In summary, "matters sought to be discovered in administrative law settings will be considered relevant if the information requested has a logical relationship to the resolution of a claim or defense in the contested case proceeding, is calculated to lead to such information, or is sought for purposes of impeachment."[8] The definition of "relevancy" for discovery purposes is not limited by the definition of "relevancy" for evidentiary purposes. Thus, information that is deemed relevant

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[2] Minn. R. 1400.6700, subp. 2.
[3] *See, e.g., Boldt v. Sanders*, 261 Minn. 160, 111 N.W.2d 225 (1961).
[4] *See, e.g., Hickman v. Taylor,* 329 U.S. 495, 507 (1947), *quoted with approval in Jeppesen v. Swanson***,** 243 Minn. 547, 551, 68 N.W.2d 649, 651 (1955); *Baskerville v. Baskerville*, 75 N.W.2d 762, 769 (1956).
[5] G. Beck, M. Gossman & L. Nehl-Trueman, *Minnesota Administrative Procedure*, § 8.5.2 at 135 (1998).
[6] *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).
[7] *Boland v. Morrill*, 270 Minn. 86, 132 N.W.2d 711, 719 (1965).
[8] G. Beck, M. Gossman & L. Nehl-Trueman, Minnesota Administrative Procedure, § 9.2 at 146 (1998).

at the discovery stage may not necessarily be admissible evidence at the hearing.[9]

Information Request No. 2. This request seeks information about the services that Qwest Corporation (the ILEC) provides to QCC (its CLEC affiliate) for purposes of serving ISP customers. Level 3 and QCC are competitors; both provide local service to customers who are internet service providers (ISPs). Level 3 has contended in this proceeding that QCC provides the same functional service as does Level 3 (assignment of VNXX numbers to its ISP customers and routing of those calls over PRI trunks across local calling areas to a modem/server, without payment of access charges) and that Qwest's refusal to agree to similar terms with Level 3 is discriminatory. Specifically, Qwest contends that Level 3 may only use interconnection trunks to route calls that originate and terminate in the same local calling area.

Qwest responded to portions of this information request. It described the terms, conditions, and rates applicable to QCC; it agreed to provide invoices for services to OCC for the provision of wholesale ISP-dialup in Minnesota; it disclosed the number of ISP customers served by QCC in Minnesota; and it provided the physical location of the modem equipment used by QCC. Subpart 2(d) asked Qwest to identify the locations by rate center of the billing addresses of these Minnesota customers; subpart 2(e) seeks the locations by rate center of each ISP's modems and servers; and subpart 2(f) seeks the locations by rate center of each PRI or other Qwest-provided service used to provide service to the ISP customers. Qwest objected to subparts 2(d), 2(e), and 2(f) on the basis that they sought information that was not relevant and not reasonably calculated to lead to the discovery of admissible evidence. In responding to the motion to compel Qwest has also argued the information is competitively sensitive.

Qwest has opposed Level 3's proposed language that would permit the use of VNXX routing across local calling areas over interconnection trunks, without the payment of access charges. The way in which Qwest and its affiliates provide competitive services to their customers is relevant to the issues raised in Level 3's petition. This information is reasonably calculated to lead to the discovery of admissible evidence. As the request is framed, it appears that Qwest could provide this information without disclosing confidential information about QCC customers. Level 3's motion to compel responses to subparts 2(d), 2(e), and 2(f) is granted. If Qwest chooses to provide the information in a manner that discloses competitively sensitive information, it could protect the information by designating it trade secret pursuant to the Protective Order.

Information Request Nos. 4. This request seeks information about the services Qwest Corporation provides to QCC for purposes of providing service to VOIP providers. It asks Qwest to provide the same types of information as in

[9] 2 D. Herr & R. Haydock, Minnesota Practice 9 (2d Ed. 1985), citing *Detweiler Brothers v. John Graham & Co.*, 412 F. Supp. 416, 422 (E.D. Wash. 1976), and *County of Ramsey v. S.M.F.*, 298 N.W.2d 40 (Minn. 1980).

Information Request 2. Qwest responded similarly, providing some information and objecting to subparts 4(d) and 4(f). Subpart 4(d) seeks the location by rate center of the billing addresses of QCC VOIP customers in Minnesota; subpart 4(f) seeks the location by rate center of the PRI or other Qwest-provided service being used to provide service to the VOIP customers in Minnesota. Qwest objected to both subparts on the basis that they sought information that was not relevant and not reasonably calculated to lead to the discovery of admissible evidence. For the same reasons articulated above, this information is reasonably calculated to lead to the discovery of admissible evidence. Level 3's motion to compel is granted.

Information Request Nos. 5(c) and 13(c). These requests, which are directed to Qwest Corporation, ask Qwest to identify where Qwest offers DSO, voice termination, outbound voice services, and wholesale dial services outside of its incumbent serving area in California, Texas, Illinois, Florida, and Massachusetts, to describe the name and physical facility or service that Qwest considers to constitute a physical point of presence in each of the local calling areas. Qwest answered these requests by stating that it does not offer services in the states listed. It objected to providing responsive information for QCC on the basis that it was not relevant or reasonably calculated to lead to the discovery of admissible evidence. For the reasons stated above, Level 3 contends Qwest should provide responsive information concerning QCC. Qwest contends it has answered the request fully and has no further responsive information concerning Qwest Corporation. Qwest also contends that information about QCC operations in other states is not relevant.

These information requests seek information that is reasonably calculated to lead to the discovery of admissible evidence; however, in contrast to Request Nos. 2-4, they do not expressly ask for information about QCC. They ask for information about Qwest, and Qwest has answered these requests as they are framed. The requests also appear to be overly broad and unduly burdensome if they were construed to include responsive information about QCC. Level 3's motion to compel further responses to these requests is denied.

Information Request No. 14. Information request No. 14 asks Qwest to provide information about how it provides wholesale voice termination services in Minnesota and in the territories of other ILECs. Voice termination is a long distance service provided by QCC. In connection with this service, QCC receives long distance traffic and delivers it to the called party by purchasing switched access service from the tariffs of the LECs that terminate long distance traffic. Qwest responded to the portions of the request asking for information about its voice termination operations in Minnesota, stated that QCC provides this service in areas outside of those in which Qwest is an ILEC, and it responded to some other subparts.

Subpart I asked Qwest to describe where Qwest maintains a point of presence in each local calling area in which it provides voice termination service and to describe the facility constituting a point of presence in each local calling area in the state. Qwest objected to providing information in response to subpart I on the basis that it was not relevant or reasonably calculated to lead to the discovery of admissible evidence. It further objected on the basis that "listing the location of all the equipment that it owns is unduly burdensome." Level 3 contends this information is relevant because Qwest has argued that a "physical presence" in a local calling area is required for traffic to be compensated as "local." Subparts D, E, F, and K seek the same information about Qwest operations in the territories of other ILECs (SBC, Verizon, BellSouth, and outside of its incumbent serving area in California, Texas, Illinois, Florida, and Massachusetts). Qwest answered these sections by stating it does not provide this service in areas outside its 14-state incumbent serving territory; QCC does. Qwest objected to providing responsive information concerning QCC on the basis that it concerns a nonparty, is not relevant, and is not reasonably calculated to lead to the discovery of admissible evidence.

The issues in this proceeding concern the extent to which ISP and VOIP traffic originated by or terminated to Qwest customers in Minnesota, that would otherwise be considered "local" traffic but for the use of VNXX routing and delivery to Level 3's customers via the internet, should be subject to the local compensation regime under § 251(b)(5) or the "hybrid regime" for ISP-bound traffic created in the *ISP Remand Order*. Information concerning QCC's "point of presence" in areas where it terminates long-distance traffic that is undisputedly subject to access charges is not reasonably calculated to lead to the discovery of admissible evidence. Level 3's motion to compel further responses to Information Request No. 14 is denied.

Information Request No. 16. This request asks Qwest to identify each local calling area within the state in which QCC maintains a physical presence, as that term is defined by Qwest in its proposed definition of VNXX traffic. Qwest objected to the request on the basis that there is no reference to the term "physical presence" in the contract language, making the request itself ambiguous.

Qwest's proposed definition of the term "VNXX traffic" is:

> all traffic originated by the Qwest End User Customer that is not terminated to the CLEC's End User Customer physically located within the same Qwest Local Calling Area (as approved by the state commission) as the originating caller, regardless of the NPA-NXX dialed and, specifically, regardless of whether CLEC's End User Customer is assigned an NPA-NXX associated with a rate center in which the Qwest End User Customer is physically located.

The proposed definition refers to the physical locations of the Qwest and Level 3 end user customers. Under the Qwest definition, if the Qwest customer and the Level 3 customer are not physically located in the same local calling area, the traffic is VNXX. It is unclear how Level 3 wants Qwest to apply this definition to QCC. Level 3's motion to compel further response is denied.

Information Request Nos. 17-19. Request No. 17 asks Qwest to identify in which states it combines CLEC local and toll traffic on a single trunk; No. 18 asks Qwest to identify each CLEC with which Qwest exchanges local and toll traffic on a single trunk group and uses a percent local use factor to establish the percentages of local vs. toll traffic on the combined trunk group; and Request No. 19 asks Qwest to identify, for each state in which a Qwest CLEC affiliate combines local and toll traffic on a single trunk group, what method is used to apportion the traffic. Qwest answered these requests with regard to its operations in Minnesota; it objected to providing information with regard to its operations in other states on the basis that the requests are overbroad, unduly burdensome, and seek information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence.

In this proceeding Qwest maintains that it cannot combine toll and local traffic on interconnection trunks as requested by Level 3 because these trunks cannot measure the toll traffic for purposes of billing access charges, and it would be expensive to program its system to implement a percent local use factor as proposed by Level 3. Qwest maintains that only Feature Group D trunks have the existing ability to differentiate this traffic. Level 3 argues that SBC, BellSouth, and Verizon all permit the exchange of all forms of traffic on interconnection trunks and that Qwest is obligated to prove that it is technically infeasible to do so here.

The requested information is reasonably calculated to lead to the discovery of admissible evidence. If Qwest combines this traffic anywhere, Level 3 is entitled to explore how it is done. Qwest has failed to provide any information to support its argument that providing such a response would be burdensome. Level 3's motion to compel further responses to Request Nos. 17-19 is granted.

Requests for Admission Nos. 14-16. Level 3 asked Qwest to admit or deny that in Iowa, it offers a transit service that involves the commingling of wireline and wireless traffic, including both interstate and intrastate telephone calls, on common trunks (No. 14), local trunks (No. 15), and Feature Group D trunks (No. 16). Qwest objected to all three requests for admission on the ground that "What Qwest has been ordered to do in Iowa is not relevant to the disputed issues in this proceeding in Minnesota."

As indicated above, these requests seek information about whether Qwest combines local and toll traffic on different types of trunks; they are reasonably calculated to lead to the discovery of admissible evidence. Level 3's motion to compel responses to these requests for admission is granted.

Level 3's Motion to Strike Testimony

Level 3 and Qwest filed their direct testimony on May 30, 2006;[10] the Department filed its direct testimony on July 21, 2006;[11] Level 3 and Qwest filed their supplemental direct testimony on December 15, 2006;[12] the technical conference took place on February 6, 2007, and all parties filed reply testimony on February 28, 2007.[13] On March 13, 2007, Level 3 moved to strike some of the prefiled direct, supplemental direct, and reply testimony of Qwest witnesses Larry Brotherson, William Easton, Philip Linse, and William Fitzsimmons and Department witness Katherine Doherty, on the basis that the testimony at issue improperly consists of commentary on the legal and regulatory standards applicable to this case or the application of those standards to the facts. Qwest and the Department responded on March 22, 2007.

It is true, as argued by Level 3, that fact witnesses are generally not permitted to provide sworn testimony about the law and that legal advocacy is better reserved for legal briefs submitted by attorneys. In a proceeding to arbitrate the language of an interconnection agreement, however, the substantive legal standard to be applied is that the recommended terms must be consistent with the technical requirements of state and federal law as interpreted by the FCC, the Commission, and state and federal courts. In explaining the implications of their proposed language, and for purposes of clarifying their positions, witnesses often point to the legal authority supporting those positions. In heavily regulated areas such as telephone interconnection, this practice may in fact permit more precise examination as to the propriety of the proposed language. When the issue is how ISP-bound or VOIP traffic should be treated, it would be difficult to make sense of any testimony that did not describe the proposed language in the context of the governing legal authority.

In this case, the Administrative Law Judges do not believe that Level 3 will be prejudiced by the references to legal authority contained in the prefiled testimony. At this point, striking portions of the testimony might create more confusion in the record than leaving the testimony alone and letting the lawyers

[10] Second Prehearing Order (May 4, 2006).
[11] *Id*.
[12] Fourth Prehearing Order (Sept. 26, 2006).
[13] Fifth Prehearing Order (Jan. 29, 2007).

point out where positions are legally unfounded. Level 3's motion to strike is accordingly denied.

K.D.S., S.M.M.